BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
The Commission's Cable Horizontal and Vertical Ownership Limits	)	MM Docket No. 92-264
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interest	)	MM Docket No. 94-150

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the above-captioned *Further Notice of Proposed Rulemaking* ("*Further Notice*"),[1] which seeks comment regarding the Commission's channel occupancy rules and cable ownership attribution rules.

I. INTRODUCTION AND SUMMARY

The *Further Notice* marks the third time the Commission has sought comment on channel occupancy rules since the D.C. Circuit invalidated those rules in 2001. In its *Time Warner II* decision, the court concluded that the Commission had failed to justify a 40% channel occupancy limit under either the arbitrary and capricious standard of the APA, or the far more exacting intermediate scrutiny standard of the First Amendment. Marketplace and technological developments over the intervening seven years make the re-imposition of channel occupancy

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1 *In re The Commission's Cable Horizontal and Vertical Ownership Limits, Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, et al., Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2134 (2007) ("*Further Notice*" or "*Horizontal Ownership Order*," as appropriate).

rules entirely unjustifiable. Under such conditions, and consistent with court and Commission precedent, the Commission must conclude that there is no legitimate basis for a vertical ownership limit.

The *Time Warner II* court explained that any ownership limit must be based on substantial evidence of non-conjectural harm. There is no such evidence of harm. The vertical foreclosure concerns that underlay congressional adoption of the vertical ownership statute in 1992 and the Commission's adoption of a 40% limit in 1993 are no longer relevant. At that time, satellite service did not even exist, major telephone companies had not entered the cable business, and Internet and other non-traditional video distribution platforms had yet to emerge. There were only 68 nationally delivered cable programming networks, and 57% of those networks were vertically integrated with a cable operator.

The video programming and distribution marketplaces have changed fundamentally and irreversibly since that time. Today, DBS now accounts for more than 30% of MVPD subscribers; Verizon and AT&T are offering cable service to millions of households around the country; and the Internet, mobile phones, and other technological innovations are providing new distribution options for video suppliers and consumers. Moreover, there has been explosive growth in the number and diversity of video programming services. The Commission recently reported that there are 565 national networks, the overwhelming majority of which are unaffiliated with a cable operator. In addition, consumers can access an enormous range and diversity of video content via video-on-demand ("VOD") and Internet web sites.

Under these conditions, the Commission cannot provide substantial evidence of non-conjectural harm to the video programming business, as would be required by *Time Warner II* to justify any occupancy limits. Nor can it demonstrate that cable operators have the ability or incentive to engage profitably in a foreclosure strategy against unaffiliated programmers. With respect to a cable operator's ability to foreclose, there are too many alternative programming outlets, with low barriers to entry, for such a strategy to work. Programmers can reach substantial and increasing numbers of viewers through DirecTV, Dish Network, AT&T, Verizon, and other competing MVPDs. Unsurprisingly, in this competitive landscape, there has been, and continues to be, explosive growth in the number of video programming networks -- to say nothing of the limitless supply of video content now provided to consumers on YouTube and other Internet video services.

Cable operators also lack the incentive to engage in a foreclosure strategy. As the *Time Warner II* court explained, such a strategy would "threaten the firm's very survival." If a cable operator were to deny carriage to a popular programming service to benefit an affiliated service, it risks the loss of customers to rival MVPDs that do carry the popular service. Rather, in a robustly competitive MVPD marketplace, cable operators -- like their DBS and telco rivals -- face a business imperative to increase the supply of video programming to consumers. This is borne out by the fact that the typical digital cable system today carries 200 or more channels of video programming and thousands of VOD options. And the vast majority of that content is unaffiliated with cable operators.

Notwithstanding this marketplace evidence and the directives from the *Time Warner II* court, the Commission now makes a number of proposals that would, in the aggregate, substantially *expand* the scope of the prior, discredited channel occupancy limit. There is no support for adopting any of these proposals. Applying a channel occupancy limit to all activated channels on a cable system (the prior rule was limited to 75 channels) would impose unlawful First Amendment burdens on cable operators. Likewise, counting affiliated regional programming networks toward the vertical ownership limit (such channels were excluded under the prior rule) would chill investment in such regional networks, contrary to the policy directives in the ownership statute and the Commission's prior conclusions in its 1993 order. Furthermore, extending the channel occupancy limit to all cable-affiliated networks (the prior rule was limited to networks affiliated with the specific operator at issue) would violate the plain language of the cable ownership statute and would otherwise be inconsistent with the legislative history and Commission precedent.

Finally, the Commission invites comment on proposed changes to cable attribution rules that were also addressed by the *Time Warner II* court. As explained in more detail below, the Commission should retain the single majority shareholder exemption, abandon the no-sale rule, and make certain changes to its equity-debt ("ED") rules.

II. THE CURRENT COMPETITIVE MARKETPLACE AND THE RECORD DO NOT JUSTIFY ANY CHANNEL OCCUPANCY RULE.

A. The Commission Has Both The Legal Authority And Constitutional Obligation To Eliminate The Channel Occupancy Limit If Marketplace Facts Warrant.

Eliminating the channel occupancy limit is well within the Commission's legal authority. The ownership provisions of the 1992 Cable Act do not mandate the imposition of a channel occupancy limit regardless of market circumstances. Rather, the Commission is directed to conduct a rulemaking to establish a *reasonable* limit.[2]

The channel occupancy rules are authorized for the statutory purpose of ensuring "that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems … [and cannot] unfairly impede ... the flow of video programming from the video programmer to the consumer."[3] In determining whether a limit is "reasonable," the FCC is obligated to ensure that any rule reflects "the dynamic nature of the communications marketplace," accounts for "any efficiencies and other benefits that might be gained through increased ownership or control," and does not "impair the development of diverse and high quality video programming."[4] Congress also directed the Commission to "rely on the marketplace, to the maximum extent feasible, to achieve" "the availability to the public of a diversity of views and information."[5]

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2 47 U.S.C. § 533(f)(1).

3 *Id*. §§ 533(f)(2)(A) & (B).

4 *Id*. §§ 533(f)(2)(D), (E) & (G)

5 Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, §§ 2(b)(1)-(2) ("1992 Cable Act").

The Commission adopted the channel occupancy limit in 1993 based on congressional concerns that cable operators "could make it difficult for non-cable affiliated … programmers to secure carriage on vertically integrated cable systems" due to cable operators' purported "ability and the incentive to favor their affiliated programmers over unaffiliated [programmers]."[6] However, the Commission specifically recognized at the time -- and has underscored since -- that these vertical foreclosure concerns might be alleviated in light of marketplace and technological developments and has repeatedly acknowledged that it has the authority to eliminate any vertical ownership limit if circumstances warrant. For example, in its *1993 Vertical Ownership Order*, the Commission stated that: "This limitation will be subject to periodic review along with the other provisions of these rules and will be eliminated if developments warrant."[7] Likewise, in its *1995 Vertical Ownership Reconsideration Order*, the Commission explained that "we still believe that the vast expansion of channel capacity may obviate the need for a rigid occupancy limit."[8] As detailed below, the conditions that the Commission indicated might warrant elimination of the vertical ownership limit have in fact occurred.[9]

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[6] *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits*, Second Report & Order, 8 FCC Rcd. 8565 ¶ 41 (1993) (citing 1992 Cable Act, Section 2(a)(5)) ("*1993 Vertical Ownership Order*").

[7] *1993 Vertical Ownership Order* ¶ 84; *see also id.* ¶¶ 83, 89.

[8] *See In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Vertical Ownership Limits*, Memorandum Opinion and Order on Reconsideration of the Second Report & Order, 10 FCC Rcd. 7364 ¶ 34 (1995) ("*1995 Vertical Ownership Reconsideration Order*"); *see also In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992: Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; The Commission's Horizontal and Vertical Ownership Limits*, et al., Fourth Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 17312 ¶ 75 & n.173 (2001) ("*2001 Ownership FNPRM*").

[9] Courts have long held that the Commission cannot continue to apply rules or policies when the circumstances that gave rise to the rules or policies when they were adopted no longer apply. *See*, *e.g.*, *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) ("[I]t is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior

(footnote continued…)

The Commission's ability to justify the continuation of any channel occupancy limit is also constrained by the First Amendment. The *Time Warner II* court concluded that any limit would be subject to intermediate First Amendment scrutiny.[10] Under this standard, a regulation can only be upheld if "it furthers an important or substantial government interest … and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[11] The Supreme Court has further instructed that any such rule be justified by a substantial evidentiary record: "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. . . . '[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'"[12]

(…footnote continued)

decision . . . has been removed.'"); *Meredith Corp. v. FCC*, 809 F. 2d 863, 874 (D.C. Cir. 1987), quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943) ("If time and changing circumstances reveal that the 'public interest' is not served by the application of the regulations, it must be assumed that the Commission will act in accordance with its statutory obligations."); *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continued operation."); *see also Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*") (to satisfy First Amendment intermediate scrutiny, "the FCC must show a record that validates the regulations, not just the abstract statutory authority"); *Telecomms. Resellers Ass'n v. FCC*, 141 F.3d 1193, 1197 & n.6 (D.C. Cir. 1998) (the Commission is at liberty not to adopt any regulations, if it finds that no regulations are necessary, pursuant to a statute directing the Commission to adopt "such regulations … as are necessary").

10 *Time Warner II*, 240 F.3d at 1137.

11 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

12 *Id.* at 664 (citations omitted).

The *Time Warner II* court found that the Commission had failed to justify the channel occupancy limit adopted in 1993 even under the arbitrary and capricious standard, let alone the far more exacting First Amendment standard.[13] The record that the Commission has compiled during the last seven years is bereft of the substantial evidence that might justify adoption of any channel occupancy limit. As explained in the next section, there is simply no credible basis for the Commission to claim that vertical foreclosure is a realistic concern in today's highly dynamic and competitive marketplace.

B. A Channel Occupancy Limit Cannot Be Justified In Light Of Marketplace Developments.

The Commission asks whether cable operators have the ability and incentive to engage profitably in vertical foreclosure of unaffiliated programmers.[14] The answer is that they do not. In the nearly fifteen years since the Commission first devised the channel occupancy limit, the video programming marketplace has changed dramatically and irreversibly. As shown below, the number of distribution outlets for video programming has exploded, the number of independent networks has skyrocketed, and vertical integration between cable operators and programmers has decreased substantially. Vertical foreclosure is not a realistic concern under these conditions.

1. Cable Operators Do Not Have The Ability To Foreclose Unaffiliated Programmers.

Even if a cable operator wanted to block an unaffiliated programmer from reaching consumers, the cable operator would be unable to do so. Simply put, there are too many

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13 *Time Warner II*, 240 F.3d at 1137.

14 *Further Notice* ¶ 137.

alternative programming outlets, with low barriers to entry, for a cable operator to be able to foreclose an unaffiliated programmer. Competition among multichannel video programming distributors ("MVPDs") is more intense than ever, and video downloads, streaming video, wireless broadband, and a host of other new technologies, services, and products are further expanding distribution options. Congress' goals of competition and diversity are being realized in ways no one could have imagined when the Cable Act was enacted in 1992.

Most significantly, the two national DBS providers, which had no customers in 1992, now serve more than 30 million customers, and are the second and third largest MVPDs in the country.[15] Programmers also can reach substantial and increasing numbers of viewers through any number of telephone companies and other overbuilders that are rapidly rolling out cable service in competition with more traditional cable operators. As the Commission has found: "At the end of 2006, Verizon reported that it offered video programming via FiOS TV to more than 2.4 million households in 200 cities in 10 states and served 207,000 subscribers. At the end of 2006, AT&T served approximately 11 cities through U-verse TV."[16] These deployment and subscribership numbers have only accelerated in the past year. As of December 2007, Verizon reported that it had 943,000 customers for its FiOS cable service (a nearly *five-fold* increase over

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15 *See* Press Release, DIRECTV Group, Inc., *The DIRECTV Group Announces Fourth Quarter 2007 Results* (Feb. 13, 2008) (reporting that DIRECTV had 16.83 million subscribers as of December 31, 2007), *available at* http://biz.yahoo.com/bw/080213/20080213005615.html; Press Release, *DISH Network Reports Fourth Quarter 2007 Financial Results* (Feb. 26, 2008) (reporting that EchoStar's DISH Network had 13.78 million subscribers as of December 31, 2007), *available at* http://biz.yahoo.com/pz/080226/137082.html; *see also* Press Release, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* (Nov. 27, 2007) ("*13th Annual Report Press Release*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf.

16 *13th Annual Report Press Release* at 3.

the previous year);[17] AT&T recently reported that it nearly doubled the number of subscribers for its U-Verse cable service, *in merely three months*, to 231,000.[18]

Programmers, including those that do not have enough content to fill an entire network, can also turn to the Internet as an easy and inexpensive distribution option. According to research firm Broadband Directions: "While starting a new cable channel today takes an initial investment of $100 million to $200 million, a broadband channel needs just $5 million to $10 million to get going."[19] Because the Internet offers *worldwide* distribution at extremely low cost, even established media companies increasingly are launching new programming and entire programming networks online and are meeting with success.[20] As of October 2006, 74 out of the

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17 Press Release, Verizon Communications Inc., *Verizon Caps Successful Year With Strong 4Q Results* (Jan. 28, 2008), *available at* http://newscenter.verizon.com/press-releases/verizon/2008/verizon-caps-successful-year.html.

18 Press Release, AT&T Inc., *AT&T Delivers Strong Fourth Quarter, Reaffirms 2008 and Multi-Year Outlook* (Jan. 24, 2008), *available at* http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=25073.

19 Bobby White, *TV Channels Move to Web, Think Outside the Cable Box*, Wall St. J., Aug. 10, 2007, at B1.

20 For example, NBC Universal and News Corp.'s online video venture Hulu.com went live on March 12, 2008. According to the site: "Hulu offers current primetime shows like The Office, Prison Break, Bionic Woman, House and Bones, and episodes from TV classics like Buffy the Vampire Slayer, Miami Vice, Arrested Development and more. We've also partnered with premier content owners like E! Entertainment, FUEL TV, SciFi Network and USA Networks to add to our growing collection of premium programming." Hulu.com, "About us" web page, *available at* http://www.hulu.com/splash/about.html. Over the past year and a half, Cartoon Network has offered Toonami Jetstream, an online extension of its Toonami action-adventure TV franchise that provides full-length episodes of action and animé programs online. According to Cartoon Network, the Toonami Jetstream site "has streamed more than 115 million video segments in just its first year and attracted an average of 1.7 million unique visitors each month." Press Release, Cartoon Network, *Cartoon Network and VIZ Media Celebrate First Anniversary of Toonami Jetstream with a Power-Packed Expanded Show Lineup* (Aug. 7, 2007), *available at* http://www.viz.com/news/newsroom/2007/08_jetstream.php. The Independent Film Channel also has turned to the Internet, to "stream[] 22 short films called 'Trapped in the Closet' by the R&B recording artist R. Kelly." Michel Marriott, *Nothing To Watch on TV? Streaming Video Appeals to Niche Audiences*, N.Y. Times, Aug. 6, 2007, *available at* http://www.nytimes.com/2007/08/06/business/media/06stream.html.

top 75 cable networks were offering broadband video on their websites.[21] Moreover, several recent polls and studies have reported that Internet streaming is increasingly becoming a substantial source of video programming content, as viewers (especially young viewers) are turning to the Internet for video programming and substituting Internet video viewing for television viewing.[22]

As the Commission recently observed in the context of revising its media cross-ownership rules: "The later dawning of the Internet as a major distribution channel for content has accelerated … audience fragmentation. As new digital technologies are being introduced, audiences continue to splinter, and advertising dollars continue to shift with the changing structure of the marketplace."[23] These dramatic developments, cited by the Commission to

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[21] *See* Press Release, Broadband Directions LLC, *New Market Intelligence Report Finds Broadband-Delivered Video Is Now #1 New Business Priority for Many Top Cable TV Networks* (Oct. 23, 2006), *available at* http://www.broadbanddirections.com/press_061023.html.

[22] *See* Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. Times, Mar. 10, 2008 ("A study in October [2007] by Nielsen Media Research found that one in four Internet users had streamed full-length television episodes online in the last three months, including 39 percent of people ages 18 to 34 and, more surprisingly, 23 percent of those 35 to 54."), *available at* http://www.nytimes.com/2008/03/10/technology/10online.html; Press Release, IDC, *IDC Finds Online Consumers Spend Almost Twice as Much Time Using the Internet as Watching TV* (Feb. 19, 2008) ("A new IDC study of consumer online behavior found that the Internet is the medium on which online users spend the most time (32.7 hours/week). This is equivalent to almost half of the total time spent each week using all media (70.6 hours), almost twice as much time as spent watching television (16.4 hours)."), *available at* http://www.idc.com/getdoc.jsp?containerId=prUS21096308; Press Release, Pew Internet & American Life Project, *Increased Use of Video-sharing Sites* (Jan. 9, 2008) ("48% of internet users have been to video-sharing sites such as YouTube and the daily traffic to such sites on a typical day has doubled in the past year."), *available at* http://www.pewinternet.org/PPF/r/232/report_display.asp; Press Release, Pew Internet & American Life Project, *Online Video: 57% of internet users have watched videos online and most of them share what they find with others* (July 25, 2007) ("Fifty-seven percent of online adults have used the internet to watch or download video, and 19% do so on a typical day. Three-quarters of broadband users (74%) who enjoy high-speed connections at both home and work watch or download video online."), *available at* http://www.pewinternet.org/PPF/r/219/report_display.asp; *see also* Press Release, Harris Interactive, *One-Third of Frequent YouTube Users are Watching Less TV to Watch Videos Online* (Jan. 29, 2007) (reporting that almost 41% of adults on the Internet say they have watched a video at a TV network website), *available at* http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1168.

[23] *In the Matter of 2006 Quadrennial Regulatory Review*, et al., Report & Order and Order on Reconsideration, 23 FCC Rcd. 2010 ¶ 24 (2007) ("*2007 Cross-Ownership Report & Order*"). The Commission further observed: "The new and broader array of inputs from online sources available to the American public …

(footnote continued…)

support the loosening of its broadcast cross-ownership rules, have primarily occurred in the years since the *Time Warner II* decision in 2001.[24]

Given the wide range of distribution options for programmers, it is unsurprising that there has been -- and continues to be -- explosive growth in the number and diversity of programming services. At the time Congress adopted the 1992 Cable Act, there were only 68 nationally delivered cable networks.[25] Late last year, the Commission reported that there were 565 national cable programming networks.[26] There has been similar growth in the number of regional and local video programming services over that time frame. In 2006, the Commission identified 101 regional and local video programming networks that compete with broadcast networks,

(…footnote continued)

also act as competing outlets – even, at times, as work-around channels of information in cases where the mainstream media has been slow or reluctant to react." *See id.* ¶ 37; *see also id.* n.126 ("The most dramatic changes to the traditional role of media outlets have occurred with respect to the aggregation and dissemination of content. Text, video, and audio content can be and already is widely delivered, live or recorded, via the Internet. In addition, the ongoing deployment of new content delivery applications made specifically for use by handheld mobile devices is likely to further erode the market share of traditional media outlets, which must compete for eyes and ears with these new entrants in the content delivery marketplace. With respect to the role of broadcasters and publishers as aggregators, we note that the Internet is rapidly developing new ways to aggregate content, particularly by means that allow individual consumers to tailor the types and amount of content that is delivered to them. Aggregation sites are rapidly growing in popularity, with the most popular sites reaching audiences that dwarf all but the largest and most widely distributed traditional media outlets.").

[24] As Commissioner McDowell recently noted: "Today we have hundreds of cable channels cranking out a multitude of video content produced by more, not fewer, but *more* independent voices than existed 32 years ago. Now we have two vibrant satellite TV companies, telephone companies offering video, cable overbuilders, satellite radio, the Internet and its millions of websites and bloggers, a plethora of wireless devices operating in a robustly competitive wireless market place, iPods, Wi-Fi, and much more. And that's not counting the myriad new technologies and services that are coming over the horizon such as those resulting from our Advanced Wireless Services auction of last year, or the upcoming 700 MHz auction, which starts next month." *2007 Cross-Ownership Report & Order* (Separate Statement of Commissioner McDowell) (emphasis in original).

[25] H.R. Rep. No. 102-628, at 41 (1992) ("1992 House Report").

[26] *13th Annual Report Press Release* at 4.

compared to 75 in 1999 when the Commission first began providing a separate count of such networks (which was far more than existed in 1993).[27]

Moreover, the overwhelming majority of these video programming networks are unaffiliated with a cable operator. Congress included the channel occupancy provision in the 1992 Cable Act to address its concerns that the cable industry had become increasingly vertically integrated and that, as a result, cable operators would favor their affiliated programmers over unaffiliated programmers.[28] At that time, 57% of national programming networks were vertically-integrated with a cable operator.[29] The programming marketplace is substantially different today. Only 15% of national programming networks are vertically integrated,[30] and if adjustments are made for pay-per-view channels, the figure drops still further to 13.5% (based on 2005 figures).[31] The 2007 Goolsbee study cited by the Commission in its *Further Notice* makes

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[27] *Compare id.* with *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd. 978 ¶ 16 (1999) ("*6th Annual Report*").

[28] 1992 House Report at 43; S. Rep. No. 102-92 at 80 (1992) ("1992 Senate Report"); *see also 1993 Vertical Ownership Order* ¶ 41.

[29] 1992 House Report at 41.

[30] *See 13th Annual Report Press Release* at 4.

[31] *See* Letter from Michael S. Berman, Senior Vice President, Business Affairs & General Counsel, iN DEMAND Networks, to Marlene Dortch, Secretary, FCC, MB Dkt. No. 06-189, at 2 (Feb. 2, 2007) (explaining how adjustments for pay-per-view channels would bring the total of national programming networks to 480 and the number of cable-affiliated national programming networks to 65, or 13.5%).

the same basic point about the sharp reduction in vertical integration.[32] These marketplace developments undercut a key predicate for the adoption of any channel occupancy limit.[33]

Many of these unaffiliated networks are carried by cable operators. But even in situations where they are unable to obtain carriage by traditional cable operators, there is ample evidence that such networks can enter the market on other MVPD platforms.[34] To take but one example: an independent programmer can instantly access more than 16 million subscribers in every part of the continental United States by reaching a carriage agreement with DirecTV, and if it can also reach a carriage agreement with the Dish Network, it can reach over 30 million subscribers. In addition, the accelerating roll-out of cable service by the large telephone companies throughout the country has only increased the opportunities for distribution to large and growing numbers of viewers.

Other marketplace realities further underscore why vertical foreclosure is no longer a relevant concern.[35] Many smaller programming networks are owned by powerful media companies, such as Disney, Fox and Viacom. These media companies have substantial financial

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[32] Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, filed in MB Dkt. No. 06-121, at 21 (April 2007) ("Goolsbee Study") ("The share of networks identified by the FCC as being vertically integrated has basically been cut in half . . . from almost 40% in 1996 to just over 20% in 2005."), cited at *Further Notice* n.427.

[33] At the same time, as Comcast and other commenters have previously noted, vertical integration does provide valuable efficiencies and benefits to consumers that should not be discounted. *See*, *e.g.*, Comments of Comcast Corporation, filed in MM Docket No. 92-264 (Aug. 8, 2005) (describing how vertically-integrated regional and local networks promote localism and diversity) ("2005 Comcast Comments"); Comcast Reply Comments, filed in MM Dkt. No. 92-264, at 20-22 (Sept. 23, 2005) ("2005 Comcast Reply") (describing Comcast's effort to increase the diversity of programming through investments in independent networks).

[34] *See Horizontal Ownership Order* ¶ 51 & n.181 (citing record evidence of independent networks continuing to thrive and enter in the video programming market without carriage by the largest cable operators).

[35] To the extent an unaffiliated programming network may believe that it has been unfairly discriminated against by an MVPD, the network can seek redress under the Commission's program carriage rules. *See* 47 U.S.C. § 536; 47 C.F.R. § 76.1300 *et seq.*

resources to launch and sustain a network while it builds a critical mass of viewers.[36] It cannot plausibly be claimed that programming networks developed or acquired by these companies could be foreclosed from the market by a cable operator. In addition, small, independent program suppliers can and routinely do partner with large media companies, including cable and broadcast networks, in order to gain distribution.[37] An independent creator of programming can reach 80 million or more viewers by partnering with ABC, Discovery, PBS, ESPN, or any other widely carried network. Or they can simply circumvent traditional television distribution altogether and obtain distribution on Internet sites such as Joost, which now boasts over 400 channels,[38] and YouTube, which recently announced a partnership with TiVo to display web video programming on televisions.[39]

2. Cable Operators Do Not Have The Incentive To Foreclose Unaffiliated Programmers.

The *Further Notice* also asks whether a vertically integrated cable operator would have the incentive to discriminate unfairly against an unaffiliated programmer.[40] As the Commission

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36 *See*, *e.g.*, Comments of Viacom Inc., filed in MB Dkt. No. 07-198, at 15 (Jan. 4, 2008) (describing how Viacom was able to finance, launch and obtain carriage for Noggin, which "was significantly aided by the company's ability to package the channel with other [Viacom] networks").

37 *See*, *e.g.*, 2005 Comcast Comments at 62 (detailing routine partnerships of large media companies such as HBO and Discovery Communications with independent program suppliers); *id*. at 61 (independent program suppliers can gain carriage through partnering with a must-carry broadcast or leased access channel).

38 Joost advertises on its front page that it currently has "20,000+ programs, 400+ channels." Joost web page, *available at* http://www.joost.com (last accessed Mar. 26, 2008).

39 Brian Stelter, *TiVo and YouTube to Deliver Web Video to TV*, N.Y. Times, Mar. 12, 2008, *available at* http://www.nytimes.com/2008/03/12/technology/12cnd-tivo.html?_r=1&hp&oref=slogin. Netflix, which already offers Internet streaming of thousands of movies and television programs to its subscribers in addition to its mail delivery of DVDs, also reportedly has plans to allow its video programs to be viewed on television. *See* Brad Stone, *Netflix Partners With LG to Bring Movies Straight to TV*, N.Y. Times, Jan. 3, 2008, *available at* http://www.nytimes.com/2008/01/03/technology/03netflix.html.

40 *See Further Notice* ¶ 137.

has observed previously, in a competitive MVPD marketplace, cable operators have "the incentive to provide programming that is most valued by subscribers."[41] If a cable operator were to deny carriage to a popular programming service to benefit an affiliated service, it risks the loss of customers to rival MVPDs that do carry the popular service.[42]

Furthermore, today, more than ever, cable operators face a competitive imperative to *increase*, rather than decrease, the flow of programming to consumers. At the time the FCC adopted the channel occupancy rules in 1993, most cable systems operated in analog and had limited channel capacity.[43] In response to competition from DBS, cable invested more than $110 billion to upgrade plant, expand capacity, and introduce new services. A typical cable system in 1993 had 75 or fewer analog channels;[44] today, a typical digital cable system offers 200 or more channels, and thousands of VOD programs,[45] pursuant to voluntary, market-driven, mutually beneficial carriage agreements.[46] The marketplace-driven imperative to add programming

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[41] *See In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions*, First Report & Order, 8 FCC Rcd. 6828 ¶ 231 (1993) ("*1993 First Ownership Report*").

[42] *See Time Warner II*, 240 F.3d at 1138 (noting that favoring affiliated programmers "may threaten a competitive firm's very survival").

[43] The Commission noted in 1993 that the vast majority of cable subscribers received less than 54 channels. *1993 Vertical Ownership Order* ¶ 80.

[44] *See id.* ¶ 84 & n.106 (noting that a conventional 550 MHz cable system "enables the distribution of approximately 75 video channels"); *id.* ¶ 80 ("Time Warner stated that 75 channels "is the maximum channel capacity available using current cable technologies…. Thus, Time Warner suggests that 75 channels is an appropriate threshold beyond which channel occupancy limits should no longer apply.").

[45] Comments of Comcast Corporation, filed in MB Dkt. No. 07-42, at 8 (Sept. 11, 2007) ("2007 Comcast Comments").

[46] The FCC concluded in its *10th Annual Video Competition Report* that "the vast majority of Americans enjoy more choice, more programming and more services than any time in history." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd. 1606 ¶ 4 (2004) ("*10th Annual Report*"). In its *11th Annual Video Competition Report*, the FCC concluded that "almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two

(footnote continued…)

choices continues unabated. Cable operators are working to free up additional channel capacity for more HD programming, faster Internet speeds, and other innovations, notwithstanding regulatory policies, such as expanded must-carry and leased access, and costly equipment regulations, that are complicating those efforts.[47]

Marketplace evidence also demonstrates that the overwhelming majority of video programming carried by cable operators is drawn from unaffiliated networks. For example, of the 200 or more channels of video programming available on the typical Comcast digital cable system today, less than 20 are affiliated with Comcast,[48] and none of those channels is among the top-20 channels rated by subscribership or by prime time viewership.[49] As the *Time Warner II* court noted: "Vertically integrated MVPDs evidently use loads of independent programming."[50]

A foreclosure strategy would be economically irrational in another respect. In today's highly diverse video programming marketplace, there are typically multiple programming

(…footnote continued)

[direct broadcast satellite] (DBS) providers" and found that "[i]n some areas, consumers may also choose between other traditional (e.g., broadcasting, cable, DBS) and emerging (e.g., use of digital broadcast spectrum, fiber to the home, video over the Internet) delivery technologies as well." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Eleventh Annual Report, 20 FCC Rcd. 2755 ¶ 4 (2005) ("*11th Annual Report*"). In its *12th Annual Video Competition Report*, the FCC reiterated that "[c]ompetition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation." *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd. 2503 ¶ 5 (2006) ("*12th Annual Report*").

47 Comcast recently announced Project Infinity, which aims to vastly increase the number of HD channels and VOD content available to Comcast subscribers. *See* Press Release, Comcast Corporation, *Comcast CEO Brian Roberts Announces Project Infinity: Strategy to Deliver Exponentially More Content Choice on TV* (Jan. 8, 2008), *available at* http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=724.

48 Comments of Comcast Corporation, filed in MB Dkt. No. 06-189, at 61 (Nov. 29, 2006) ("2006 Comcast Comments").

49 *See 12th Annual Report* at Table C-5 (listing the top 20 programming services by subscribership); Bill Gorman, *Weekly Top Cable Networks: March 3-9, USA & Nick*, TVbytheNumbers, Mar. 13, 2008, *available at* http://tvbythenumbers.com/2008/03/13/weekly-top-cable-networks-march-3-9/2914.

50 *Time Warner II*, 240 F.3d at 1139.

services in any particular program category. For example, numerous networks today provide children's programming, such as PBS Kids SPROUT (which is affiliated with Comcast) as well as, among others, Cartoon Network, Discovery Kids, the Disney Channel, Nickleodeon, Nicktoons, Noggin, and Toon Disney (none of which are affiliated with Comcast). A foreclosure strategy that targeted only one of these networks (or a new promising entrant) would add very little marginal benefit to Comcast's own affiliated network; the primary beneficiaries would be other competing programming networks. To obtain any economic benefit for Comcast, a foreclosure strategy would have to block multiple unaffiliated networks (or multiple entrants) from obtaining carriage. Such a strategy would have extremely high costs and little chance of success.

C. The Studies Cited By The Commission Are Flawed And Do Not Support A Result Other Than Eliminating The Vertical Limit.

Time Warner II underscored that there must be substantial evidence of non-conjectural harm in order for an ownership limit to pass muster under the First Amendment. As shown above, there is no basis to conclude that vertical foreclosure is a real-world concern. Nor do the three economic studies referenced in the *Further Notice* (by Chen and Waterman, Kang, and Goolsbee) justify a vertical limit.[51]

As Comcast previously demonstrated in this docket, Chen and Waterman's 2005 study is flawed in several respects.[52] First, the study's grouping of similar program networks with supposedly "similar content" is misleading -- a key point that the Commission fails to

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[51] *Further Notice* ¶¶ 137-40 & nn.427-29.

[52] *See* 2005 Comcast Reply at 20-22.

acknowledge in the *Further Notice*.[53] For example, HBO and Sundance Channel are not equivalent or comparable programming services. HBO offers a wide range of original programming, such as the original series "Entourage," "Big Love," and "The Wire," as well as studio movies and other programming with wide appeal.[54] Sundance Channel targets a niche audience and focuses on independent films, world cinema, documentaries, and short films. Such differences "call[] into question the validity of Chen and Waterman's conclusions given that the independent networks do not compete with the vertically integrated networks and therefore, Comcast and Time Warner would have no incentive to favor one network over another for any other reason than the attractiveness of the programming to their customers."[55]

The Chen and Waterman study is flawed for other reasons as well. For example, as Comcast has previously demonstrated, the study's findings do not support its conclusions regarding vertical foreclosure.[56] Likewise, the analysis in the study misconstrues its own data regarding tier placement and does not take into account the size of a cable operator.[57] Finally, to the extent Chen and Waterman's findings had any validity in 2005 (based on 2004 data), they are

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[53] *Further Notice* ¶ 143.

[54] HBO offers original films such as "John Adams," "As You Like It," and "Lackawanna Blues," original single-episode dramas such as "61*," and sports programming such as "Real Sports" and boxing.

[55] 2005 Comcast Reply, Ordover/Higgins Decl. at 14-15 (attached as Exhibit 1 to the 2005 Comcast Reply).

[56] *See* 2005 Comcast Reply at 21-22 (citing the Ordover/Higgins Decl., and detailing the Chen and Waterman study's findings, *inter alia*, that Comcast is no more likely than other cable operators to carry its outdoor sports network on an analog channel and no less likely than other cable operators to carry an independent outdoor sports network on an analog channel; that Time Warner is more likely to carry both its own and an unaffiliated cartoon network; and that Time Warner in several instances was equally likely to carry independent premium movie networks as its own such networks).

[57] *Id*. at 22 (citing the Ordover/Higgins Decl., and detailing the Chen and Waterman study's findings that, for half of the independent networks studied, there was no differential treatment by Comcast and Time Warner in terms of tier placement, and discussing how the study fails to account for the size of cable operators in assessing what differential treatment it found).

now certainly stale. The programming market in 2008 is even more competitive, with greater diversity of programming, than four years ago, when it was already quite competitive.

There are also fundamental flaws with the Kang study, which purports to demonstrate that cable operators "tacitly collude" to carry each others' vertically integrated programming networks. The study was based on a skewed data sample that was outdated in 2005 and is even more so today.[58] The skewed data sample results in the incorrect conclusion that carriage decisions are based on a desire to discriminate in favor of vertically-integrated networks and against unaffiliated networks.[59] The Kang paper also relies on several questionable assumptions, including the discredited assumption of collusion between cable operators.[60]

The 2007 Goolsbee study, which is relegated to Footnote 427 of the *Further Notice*, provides no support for a vertical limit. The Commission cites this study for the asserted proposition that "vertical integration generally increases the probability of carriage," and notes in passing that the study also shows that "increased DBS share in a market reduces this probability."[61] But Footnote 427 fails to describe the central policy conclusion to be drawn from the Goolsbee study: that vertical foreclosure is not a realistic concern in today's marketplace

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[58] *Id.* at 18 (citing the Ordover/Higgins Decl. and noting that the data sample is six years old and includes 20% more vertically integrated programming networks than independent networks).

[59] *Id*. (citing the Ordover/Higgins Decl., and noting that such explanatory factors include launch timing relative to available channel capacity, launch timing compared to competing programming, and programming serving unserved or underserved audiences).

[60] *Id*. at 18-19 (citing the Ordover/Higgins Decl. and detailing the following questionable assumptions relied on by the Kang study: that each of the cable networks studied is "equally attractive to advertisers and consumers;" that the two hypothetical cable operators analyzed have the same cost and revenue structures; that if neither cable operators carries a network, that network cannot be launched; and that collusion between cable operators is likely due to repeated carriage negotiations).

[61] *Further Notice* ¶ 137 & n.427 (providing the gloss on the Goolsbee study that "the propensity for self-carriage is driven more by market power considerations than by efficiencies from vertical integration").

because (1) "vertical integration is a shrinking part of the business as the number of networks in existence continues to expand robustly" and (2) "competition has taken away the ability of cable systems to take as much strategic advantage [of vertical integration] as they may have once done."[62]

III. THE COMMISSION CANNOT JUSTIFY PROPOSALS IN THE *FURTHER NOTICE* TO EXPAND THE CHANNEL OCCUPANCY RULES.

In the *Further Notice*, the Commission makes a series of proposals. Those proposals include: (1) eliminating the 75-channel cap so that a vertical limit would apply to all channels; (2) applying a vertical limit to regional programming networks, not just national networks; and (3) extending a vertical limit to all cable-affiliated programming networks, not just those affiliated with a particular cable operator. None of these proposals can be squared with the First Amendment, congressional intent, or Commission precedent.

A. There Is No Basis For Applying The Channel Occupancy Limit to All Activated Channels.

The channel occupancy rules overturned by the *Time Warner II* court prohibited a cable operator from devoting more than 40% of its activated channels on any cable system to the carriage of affiliated programming services and applied that 40% limit to a maximum of 75 channels per system.[63] The Commission selected the 75-channel cap based on the then-current channel capacity of 550 MHz cable systems.[64] The Commission anticipated that cable operators

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62 Goolsbee Study at 31.

63 *See* 47 C.F.R. § 76.504.

64 *See 1993 Vertical Ownership Order* ¶ 84 & n.106 (noting that a conventional 550 MHz cable system "enables the distribution of approximately 75 video channels"); *id.* ¶ 80 ("Time Warner stated that 75 channels "is the maximum channel capacity available using current cable technologies…. Thus, Time Warner suggests that 75 channels is an appropriate threshold beyond which channel occupancy limits should no longer apply.").

would be upgrading their cable systems and that "the expanded channel capacity that will result from fiber optic cable and digital compression technology will help *obviate the need* for [channel occupancy limits] as a means of encouraging cable operators to carry unaffiliated or competing video programming services."[65]

In fact, as discussed above, cable channel capacity has expanded considerably over the intervening years. The typical 750 MHz cable system today can carry 200 channels or more of video programming, and as cable systems migrate more analog channels to digital, more capacity will be freed up for more HD channels and other services.[66] Cable systems have evolved exactly as the Commission predicted in 1993, thus obviating the need for any channel occupancy limit -- a development previously recognized by the Commission in its *2001 Notice* in this proceeding.[67]

The Commission's new proposal, in contrast, would substantially expand the scope of the rule and thereby penalize operators that expanded their channel capacity. The Commission has provided no explanation of why it would make sense to place an additional regulatory roadblock in the way of continued investment in capacity expansion, especially where such a result would run counter to congressional policy to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems."[68]

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[65] *Id.* ¶ 83 (emphasis added); *see also 1995 Vertical Ownership Reconsideration Order* ¶ 34 ("We still believe that the vast expansion of channel capacity may obviate the need for a rigid occupancy limit.").

[66] Commission policies to expand must-carry, leased access, and cable equipment regulations, among other things, are complicating those transition efforts and, as a result, harming consumers and skewing competition.

[67] *See 2001 Ownership FNPRM* ¶ 81 ("Indeed, it appears that as capacity expands, vertically integrated systems need to fill their channels and thus tend to increase the carriage of all networks, including those of rival, unaffiliated networks.").

[68] 1992 Cable Act, § 2(b)(3).

B. Counting Affiliated Regional Networks Would Chill Investment.

The *Further Notice* also invites comment on whether the channel occupancy limit should apply to regional programming networks.[69] The Commission excluded local and regional programming networks from the limit in its 1993 order as "an important means of encouraging MSO investment in the development of local cable programming, which is responsive to the needs and tastes of local audiences and serves Congress' objectives of promoting localism."[70] The Commission further explained that "because local and regional programming services are usually costly to produce and appeal only to a limited population of subscribers, such an exception may be necessary to encourage MSOs to continue investing in such local programming."[71] This conclusion is fully consistent with Congress' directive in Section 613(f) that, in promulgating any rules, the Commission "account for any efficiencies and other benefits that might be gained through increased ownership or control" and "not impose limitations which would impair the development of diverse and high quality video programming."[72]

The Commission's approach has been validated in the marketplace. In 1993, there were relatively few regional programming networks.[73] By 2006, there were 101 regional networks.[74]

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[69] *Further Notice* ¶ 144.

[70] *1993 Vertical Ownership Order* ¶ 78.

[71] *Id.*

[72] 47 U.S.C. §§ 533 (f)(2)(D) & (G).

[73] While no specific count of regional and local networks is available from the Commission's reports circa 1993, the fact that regional and local non-broadcast programming networks were few and far between at the time was the predicate underlying the Commission's decision to exclude such networks from the channel occupancy rules. *See 1993 Vertical Ownership Order* ¶¶ 72-78.

[74] *13th Annual Report Press Release* at 4.

Promoting local and regional networks has always been, and continues to be, an important goal of the Commission[75] and Congress.[76] Consequently, the Commission's prior policy of excluding local and regional networks from the channel occupancy limit should be continued if the Commission, despite the evidence set out above, chooses to reinstate a vertical limit.

The Commission does not have unfettered discretion to reverse course on this issue, particularly where, as here, it previously rejected a proposal to make the same change to the channel occupancy rules in its reconsideration order.[77] Courts have required agencies to explain why a reversal in policy is being made:

> [W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given *sound reasons* for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. . . . Although there is not a 'heightened standard of scrutiny . . . *the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive*' [and] *such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule*.[78]

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75 *See 2007 Cross-Ownership Report & Order* ¶ 9 ("The media ownership rules are designed to foster the Commission's longstanding policies of competition, diversity, and localism."); Statement of Chairman Martin, Public Hearing on Localism, Washington, DC, at 1 (Oct. 31, 2007) ("[A]long with competition and diversity, localism is one of the three goals underlying all of our media ownership rules.").

76 Section 2(a)(10) of the 1992 Cable Act states that there is a "substantial government interest" in the "local origination of programming."

77 *See 1995 Vertical Ownership Reconsideration Order* ¶ 30 ("CME does not challenge the value of local and regional programming, or our conclusion that given the cost and limited appeal of such programming, an exemption may be necessary to encourage continued MSO investment. We continue to believe that consideration of these benefits of vertical integration more accurately reflects Congressional intent, and fully justifies the exception.").

78 *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456-57 (2d Cir. 2007) (emphasis in original and added) (citing *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)). The D.C. Circuit has explained that a decision characterized by abrupt shifts in policy or failure to acknowledge or address contradictory evidence "triggers scrutiny to ensure that the agency's change of course is not based on impermissible or irrelevant factors," *Robbins v. Reagan,* 780 F.2d 37, 48 (D.C. Cir. 1985), or is "a product of 'result-oriented' rationalization," *Continental Airlines v. CAB,* 519 F.2d 944, 957 (D.C. Cir. 1975).

Where the agency fails to provide a reasoned explanation for its decision to reverse course, such action will be set aside as arbitrary and capricious.[79] That would almost certainly be the outcome here.

C. Extending The Channel Occupancy Rules To All Cable-Affiliated Networks Would Be Contrary To The Ownership Statute And Commission Precedent.

The *Further Notice* tentatively concludes that the Commission should expand the channel occupancy limit to include video programming networks owned by or affiliated with any cable operator, not just the operator whose compliance is at issue.[80] The Commission has already found that such a rule would contravene Section 613(f)(2), which directs that the Commission "not impose limitations which would impair the development of diverse and high quality video programming."[81] As the *1993 Vertical Ownership Order* concluded: "[A]pplication of the channel occupancy limits to all vertically integrated programmers, regardless of whether they are affiliated with the particular cable operator, would severely inhibit MSO investment in video programming services, since the mere fact of such MSO investment may restrict carriage of the video programming services on all cable systems."[82] The *1993 Vertical Ownership Order* went on to note: "In the absence of significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming

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[79] *See, e.g., Fox Television Stations*, 489 F.3d at 457 (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)) (holding that an agency's rescission of a prior rule was arbitrary and capricious for failure to provide a reasoned explanation justifying revocation); *ANR Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.").

[80] *Further Notice* ¶ 145.

[81] 47 U.S.C. § 533(f)(2)(G).

[82] *1993 Vertical Ownership Order* ¶ 53

affiliated with a rival MSO. Such a restriction would be unduly burdensome on MSO investment in cable programming and would be contrary to the purpose of the statute."[83] The Commission has not explained, nor could it, why the *1993 Vertical Ownership Order* was incorrect.

Furthermore, the Commission's new interpretation of the statutory language cannot be squared with the legislative history. As the Commission concluded in the *1993 Vertical Ownership Order*, the conference report accompanying the ownership statute "specifies that such limits shall apply to 'the number of channels that can be occupied by a video programmer that is owned by a cable operator or in which *the* operator has an attributable interest.'"[84] No party challenged that interpretation on reconsideration of the *1993 Vertical Ownerhsip Order*, and the Commission must now explain why that prior interpretation is now invalid.[85]

Furthermore, the Commission's re-interpretation of the statute is illogical. A vertical foreclosure theory presumes that a cable operator has the ability and incentive to favor its own affiliated programming over unaffiliated programming. Even assuming *arguendo* that such a theory applied here, the Commission has not explained how or why a vertically integrated cable operator would have the incentive to favor programming *affiliated with other cable operators*. In fact, the Commission addressed this question in its *1993 Vertical Ownership Order* and came to the opposite conclusion: "We agree that cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO. Moreover, a vertically

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[83] *Id.*

[84] *Id.* ¶ 51 (citing Conference Report at 81) (emphasis added). Further supporting the point that Congress did not intend to apply the limit to all cable-affiliated channels, the Senate Report stated that "[t]he intent of this provision is to place reasonable limit on the number of channels that can be occupied by *each* MSO's programming services." Senate Report at 80 (emphasis added).

[85] *See supra* note 78.

integrated cable operator appears to have significantly less power to control the content or distribution of a programming service in which it has no ownership interest."[86] And the Commission's passing attempt to analogize its new proposal to the exclusivity prohibition in the program access context is similarly unavailing.[87]

Finally, the Commission may not assume collusion between cable operators to defend its proposed change to the rule. *Time Warner II* dismissed the Commission's unfounded assumption of collusion.[88] There was no evidence then, and there is no evidence now, that operators are colluding to favor each others' affiliated networks to the detriment of unaffiliated networks. The Commission acknowledged as much in its *Horizontal Ownership Order*, concluding, among other things, that it lacked "evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion" and that MSOs carried a popular network due to "the popularity of the network, not necessarily from collusive action."[89] The Commission cannot adopt its tentative conclusion given the complete absence of an evidentiary basis for doing so.

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86 *1993 Vertical Ownership Order* ¶ 53.

87 *Further Notice*, n.440. This analogy does not withstand scrutiny for several reasons. First, the program access statute is irrelevant to the vertical ownership issue, particularly in light of the plain language of the ownership statute, the legislative history already described, and Commission precedent on the scope of the channel occupancy limit. Second, the legislative history cited in Footnote 440 supports the Commission's prior interpretation, not the Commission's new tentative conclusion. *See id.* ("cable operators have the incentive and ability to favor *their* affiliated programmers" (emphasis added) (quoting 1992 Conference Report at 2)). Third, the exclusive contract prohibition in the program access context applies to all *cable operators*, while the Commission's ownership proposal would apply to all vertically integrated *cable programmers*.

88 *Time Warner II*, 240 F.3d at 1132.

89 *Horizontal Ownership Order* ¶ 66 ("Accordingly, we do not include an adjustment for coordinated action. While commenters have provided some evidence that large cable operators tend to carry the same programming networks, they have not provided a sufficient set of arguments to demonstrate that it is coordinated action rather than individual action generating the observations.").

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As detailed above, there is no valid reason for the Commission to re-impose a channel occupancy rule, particularly in light of marketplace evidence and the directives from the *Time Warner II* court. Moreover, even assuming a limit could be reinstated, the Commission's proposals to expand the scope of any such limit would be contrary to Commission precedent and congressional intent, as well as violative of the First Amendment. Below, Comcast addresses proposals in the *Further Notice* with respect to the cable attribution rules.

IV. THE COMMISSION SHOULD RETAIN THE SINGLE MAJORITY SHAREHOLDER EXEMPTION TO ATTRIBUTION, ABANDON THE "NO-SALE" ATTRIBUTION RULE, AND MODIFY ITS EQUITY AND DEBT RULE.

Time Warner II overturned the Commission's *1999 Cable Attribution Order* in two important respects. First, the court rejected the Commission's elimination of the single majority shareholder exception in cable attribution rules, finding that the Commission's decision was not sufficiently justified.[90] Second, the court rejected the Commission's finding that the limited partnership insulation criteria prohibited a limited partner from selling programming to the partnership, concluding that the no-sale rule bore no rational relationship to the goal of circumscribing a limited partner's control of, or influence on, the partnership's video programming decisions.[91] In the *Further Notice*, the Commission asks for comment "to update the record and obtain more specific comment on these attribution issues."[92] It also seeks comment on whether to modify its equity and debt ("ED") rules to track more closely similar

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90 *Time Warner II*, 240 F.3d at 1143.

91 *Id.*

92 *Further Notice* ¶ 107.

rules in the broadcast context.[93] As detailed below, the Commission should retain the single majority shareholder exemption, abandon the no-sale rule, and make certain changes to the ED rules.

A. There Is No Basis For Eliminating The Single Majority Shareholder Exemption.

The Commission acknowledged when it first adopted the single majority shareholder exemption that in a corporation with a single majority shareholder, "the minority interest holders, even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."[94] As the *Further Notice* correctly points out, "as a general matter, a majority shareholder has the right to manage and control a corporation."[95] Under such circumstances, there is no rational basis for eliminating the single majority shareholder exemption.[96]

The *Further Notice* invites comment on whether a minority shareholder could "exert influence either by virtue of its access to confidential information or by threatening to sell shares to depress the share price."[97] Such concerns are speculative and unfounded. First, minority

[93] *Id.* ¶¶ 121-24.

[94] *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Report & Order, 97 FCC 2d. 997 ¶ 21 (1984) ("*1984 Broadcast Attribution Order*"); *see also Further Notice* ¶ 110 ("we tentatively conclude that corporate management cannot be expected to be significantly influenced by a minority shareholder where there is a single majority shareholder").

[95] *Further Notice* ¶ 110.

[96] *Time Warner II* vacated the Commission's decision to eliminate the single majority shareholder exemption. *Time Warner II*, 240 F.3d at 1143. Consequently, the legal effect of *Time Warner II* is to reinstate the exemption, and no further FCC action is required.

[97] *Further Notice* ¶ 111.

shareholders do not have an automatic right to confidential corporate information,[98] and federal securities law prohibits a publicly held corporation from disclosing confidential information unless the shareholder agrees to maintain the confidentiality of that information.[99] Furthermore, even assuming a minority owner had access to confidential information, that information provides no means to influence or control management's decisions concerning programming purchasing.[100] Second, with respect to the Commission's concern that a shareholder would threaten to sell its shares to depress share value, the holder of a minority stake has no right to walk away with a portion of the assets of the corporation. At most, a minority shareholder can sell its equity interest; but the corporation itself should be indifferent to such a sale, as it does not share in the gains or losses of that transaction.[101]

The Commission's ED attribution rule further undercuts any conceivable rationale for eliminating the single majority shareholder exemption, because the purpose of the ED rule is to attribute ownership to a minority shareholder with an interest large enough to exercise influence over programming decisions, even where there is a single majority shareholder. In adopting the ED rule, the Commission explained that the requirement was intended to capture interests with

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98 *See*, *e.g.*, Del. Code Ann. tit. 8, § 220(b) (2008) (establishing shareholder right to inspect corporate books and records, provided request is made for a proper purpose).

99 *See* 17 C.F.R. § 243.100.

100 *See* AT&T Comments, Ordover Decl. ¶ 166, filed in CS Dkt. No. 92-264 (Jan. 4, 2002) ("Ordover Declaration") (casting doubt on whether a minority shareholder's access to confidential information has any relevance to that shareholder's ability to control management's programming decisions); *see also* Viacom Comments, filed in CS Dkt. No. 92-264, at 16-17 (Jan. 4, 2002) (explaining that a threat to trade stock based on confidential information may be illegal).

101 *See* Ordover Declaration ¶ 165.

the "potential . . . *to exert significant influence* over key decisions . . . ."[102] Likewise, in the *1999 Broadcast Attribution Order*, which was the model for the cable ED rule, the Commission explained that the ED rule assures that "attribution is not limited to relationships that permit control, but also extends to relationships that permit sufficient influence over core operations of the licensee such that they should be subject to the multiple ownership rules."[103] As these Commission statements make plain, a minority owner's potential to "influence" corporate decision making, notwithstanding the existence of a single majority shareholder, already is addressed by the ED rule. It would make no sense to eliminate the single majority shareholder exemption to capture interests sufficiently small that they do not even trigger attribution under the ED rule.

B. The Commission Should Not Reinstate The No-Sale Rule.

In the *1999 Cable Attribution Order*, the Commission found that its attribution rules prevented a limited partner from insulating its interest if it sold programming to the limited partnership.[104] *Time Warner II* rejected this no-sale rule, concluding that the Commission had "drawn no connection between the sale of programming and the ability of a limited partner to

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[102] *See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission's Cable Attribution Rules*, Report & Order, 14 FCC Rcd. 19014 ¶ 83 (1999) ("*1999 Cable Attribution Order*") (emphasis added); *see also id.* ¶ 86 (explaining that the ED rule's threshold was set at 33% because the Commission's goal was "not merely to attribute interests with the potential to control but also those with a realistic potential to exert significant influence.").

[103] *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report & Order, 14 FCC Rcd. 12559 ¶ 38 (1999) ("*1999 Broadcast Attribution Order*"); *see also id.* ¶ 47 (noting that the ED rule "will focus directly on those relationships that may trigger situations in which there is significant incentive and ability for the otherwise nonattributable interest holder to exert influence over the core operations of the licensee").

[104] *See 1999 Cable Attribution Order* ¶ 64.

control programming choices [of the limited partnership.]"[105] *Time Warner II* sharply constrains the Commission's ability to re-impose the no-sale rule.[106]

The general requirement of the insulation rules is that an insulated limited partner may not be "*materially involved*, directly or indirectly, in the management or operation of the video programming-related activities of the partnership."[107] The sale of programming by a limited partner to the partnership cannot reasonably be said to "materially involve" the limited partner in the complicated internal decision-making process which a cable limited partnership goes through in purchasing programming. A cable operator typically purchases the right to distribute hundreds of programming services, and specific carriage decisions are often made on a system-by-system basis. It is unrealistic to believe that a limited partner which sells a single programming service, or a few services, to a cable limited partnership has a "seat at the table" which allows it to "materially" impact the partnership's video programming decisions.

Furthermore, a limited partner seeking insulated status must comply with each of the seven criteria set out in the Commission's rules, including a bar on communications regarding the limited partnership's day-to-day video programming operations and a bar on the limited partner's active involvement in the management or operation of the video programming businesses of the partnership.[108] Negotiation of a program carriage agreement is not a "day-to-day" activity, nor can communications regarding the negotiation of a program carriage

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[105] *Time Warner II*, 240 F.3d at 1143.

[106] *See* AT&T Comments, filed in MM. Dkt. No. 92-264, at 71-77 (Jan. 4, 2002); AT&T Reply Comments, filed in MM. Dkt. No. 92-264, at 26-28 (Feb. 19, 2002).

[107] *See* 47 C.F.R. § 76.503, note 2(b)(1) (emphasis added).

[108] *See 1999 Cable Attribution Order* ¶ 64.

agreement be extrapolated into communications regarding program carriage decisions generally. As the *Time Warner II* court pointed out, even if a limited partner, by virtue of the sale of programming to the partnership, had the theoretical ability to control or influence the partnership's programming choices, "given the independent criterion barring even communications on the video programming business, exercise of that power would seem to be barred."[109] Since the insulated limited partner must certify that it complies with the insulation restrictions, there is no rational basis for concluding that simply by selling programming to the limited partnership, the limited partner is "materially involved in the partnership's video programming-related activities," which, as noted above, is the linchpin for insulation.[110] No party has ever submitted any empirical evidence to the contrary.[111]

Reinstatement of the no-sale rule also would chill investment in cable systems and programming. A cable operator with ownership interests in video programming would naturally be wary of investing as a limited partner in another cable operator if doing so would constrain its ability to sell its programming to the partnership. Likewise, a cable operator that already has a limited partnership interest in another operator might avoid investing in video programming since the no-sale rule would limit its ability to sell such programming to the partnership. Such

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[109] *Time Warner II*, 240 F.3d at 1143; *see also* Ordover Declaration ¶¶ 168-71. Contrary to the suggestion in the *Further Notice*, *Further Notice* ¶¶ 119-20, a limited partner can sell a programming service to the partnership without violating the prohibition on communications pertaining to the *day-to-day operations* of the partnership's video programming business.

[110] The *Further Notice* invites comment on whether status as a limited partner affects carriage decisions by the partnership. *Further Notice* ¶ 118. An insulated limited partner is, by definition, not materially involved in the video programming decisions of the partnership. Under such circumstances, the partnership -- not the insulated limited partner -- makes carriage decisions for the partnership.

[111] *See Time Warner II*, 240 F.3d at 1132 (noting that "the economy is filled with firms that, like MSOs, display partial upstream vertical integration" and if that implies collusion, "one would expect the Commission to be able to point to examples").

outcomes would be contrary to Commission policy that the attribution rules "permit arrangements in which a particular ownership or positional interest involves minimal risk of influence, in order to avoid unduly restricting the means by which investment capital may be made available to . . . industry."[112]

Furthermore, Commission precedent does not support denying a limited partner insulated status based solely on the sale of programming to the partnership. A long line of Commission decisions recognizes that even an investor with a significant ownership interest in a licensee can also sell programming to the licensee without influencing the buyer's programming decision.[113] *Twentieth Century Holdings* -- a Commission case referenced in the *Further Notice* -- is not relevant to the instant review of the no-sale rule.[114] That decision involved the relationship between a broadcast network and its *wholly-owned* affiliate station, and emphasized the uniqueness of this relationship and the special concerns the Commission has with regard to a broadcast network's control and influence over its affiliates.[115] The case also dealt with the

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112 *1999 Broadcast Ownership Order* ¶ 5 (cited in *Further Notice* ¶ 92).

113 *See, e.g.*, *BBC License Subsidiary*, Memorandum Opinion and Order, 10 FCC Rcd. 10968 (1995); *BBC License Subsidiary*, Memorandum Opinion and Order, 10 FCC Rcd. 7926 (1995); *Univision*, Memorandum Opinion and Order, 7 FCC Rcd. 6672 (1992). Moreover, under the broadcast equity-debt plus rule, an investor can have up to 33% of the licensee and also provide the licensee up to 15% of its programming and still remain non-attributed. *See* 47 C.F.R. § 73.3555, note 2(j).

114 *See Twentieth Century Holding Corp.*, 4 FCC Rcd. 4052 (1989) ("*Twentieth Century Holdings*"). *See* AT&T Comments, filed in MM. Dkt. 92-264, at 75-77 (Jan. 4, 2002) (explaining why *Twentieth Century Holdings* is inapt).

115 *Twentieth Century Holdings* ¶ 17 (noting that "[t]he relationship between an affiliate and a network is substantial and on-going" and that "[a] network affiliation goes to the essence of a station's operation."); *see also id.* ¶ 15 n.11 ("We are not dealing with infrequent or one-time contacts, but an extensive, on-going relationship.").

placement of a broadcast property into a trust, which is subject to a entirely different set of attribution rules.[116]

C. The Commission Should Make Certain Changes To The Equity-Debt Rule.

The *Further Notice* invites comments on a number of proposed modifications to the ED rule, including: (1) the attribution of options, warrants, and loan guarantees; (2) the calculation of total assets; and (3) the use of the multiplier in calculating indirect, intervening interests.[117] With respect to the first issue, Comcast does not believe options and warrants should be considered for purposes of the ED rule since they do not convey the underlying interest they entail until exercised. Nonetheless, to the extent the Commission elects to include the amount of consideration paid for options and warrants in the ED calculation, it should clarify that such amount should be counted in the numerator (*i.e.*, financial interest in an entity) and denominator (*i.e.*, total assets of the entity). This approach would be consistent with Commission policy of counting "all equity and/or debt in whatever manner or amount held" in the ED computation.[118]

With respect to the second issue, Comcast agrees that, regarding the calculation of an entity's "total assets," the Commission should "provide applicants flexibility to use the most accurate valuation" of the relevant entity.[119]

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[116] *Compare* 47 C.F.R. § 73.3555, Note 2(e) (insulation rules for broadcast-related trusts) *and id.* § 76.501, Note 2(d) (insulation rules for cable-related trusts) *with id.* § 73.3555, Note 2(g) (insulation rules for broadcast-related limited partnerships) *and id.* § 76.501, Note 2(f) (insulation rules for cable-related limited partnerships).

[117] *See Further Notice* ¶¶ 122-124.

[118] *Id.* ¶ 123 (citing *Broadcast Ownership Reconsideration Order*, 16 FCC Rcd. 1097 ¶ 28 (2001)).

[119] *In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, et al., Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd. 1097 ¶ 28 (2001) ("*Broadcast Ownership Reconsideration Order*").

With respect to the third issue, Comcast also agrees that the multiplier should be used to identify indirect, intervening interests and that the pass-through exemption for linkages that exceed 50 percent should *not* apply.[120] As the Commission has stated, the pass-through exception was designed to account for instances of *de jure* control in the vertical ownership chain (*i.e.*, the ownership interest exceeds 50 percent of voting equity).[121] The ED rule, in contrast, sweeps more broadly to cover all equity and debt interests (including non-voting equity interests), so it would not be appropriate to apply the pass-through exemption.[122]

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[120] *See Further Notice* ¶ 124.

[121] *See 1984 Attribution Order*, 97 FCC 2d. 997 ¶ 41 n.47 ("This pass through provision reflects the line of *de jure* control."); *see also Broadcast Ownership Reconsideration Order* ¶ 35.

[122] *See Broadcast Ownership Reconsideration Order* ¶ 35 ("Because the EDP rule applies not only to voting equity, but also to nonvoting equity and debt, we will not employ the pass-through exemption to determine which interests are attributable under the EDP rule."). The Commission has made the same determination in the foreign ownership context. *See id.*

V. CONCLUSION

For the foregoing reasons, Comcast respectfully requests that the Commission not adopt a channel occupancy rule. To the extent the Commission nonetheless decides to reinstate the rule, it should not adopt the proposals in the *Further Notice* to expand the scope of the rule. Finally, the Commission should retain the single majority shareholder exemption, abandon the no-sale rule, and make certain changes to the ED rules, consistent with these comments.

Respectfully submitted,

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